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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1687

October Term, 1973

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

CHEF FOODS, INC.,

and

YOUR HOST BAKERY, INC.,
Respondents.

REPLY TO PETITION

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Statement

Internal Revenue Agents, explaining that their purpose was to disallow the surtax exemptions of fourteen of the sixteen corporations owned by Alfred J. Durrenberger, allocated the net income of thirteen of them (including Chef Foods, Inc.) to the first corporation formed by Mr. Durrenberger (Your Host, Inc., incorporated in 1947) and taxed it there at 48% with the benefit of only Your Host's surtax exemption.

They then allocated all of the net income of Your Host Bakery, Inc. to the second corporation formed by Mr. Durrenberger (Sher-Del Foods, Inc., also incorporated in 1947).

By consolidating the income of fourteen corporations on the tax return of one corporation, they *indirectly* but neatly excised thirteen of the fourteen surtax exemptions. They used § 482 of the Internal Revenue Code as their authority for this. The surtax exemption of Your Host Bakery, Inc. was likewise nullified by the consolidation of its income with Sher-Del Foods, Inc.

To accomplish their purpose one way or another, they cited § 269 in the alternative as their authority for disallowing the surtax exemptions *directly*. The dollar result is exactly the same, of course, whether the income is taxed to thirteen corporations without the benefit of surtax exemptions or to a fourteenth corporation with only one surtax exemption.

They did this for the same reason given for the granting of this Writ—"to protect the revenue"—if they were wrong under § 482 and even though it imposed on the taxpayers the burden of proving the propriety of every major business decision made by Ross T. Wesson and Alfred J. Durrenberger (both deceased) during a 25 year period commencing in 1945.

The Tax Court found that the Commissioner had improperly taxed Your Host, Inc. with the net income of all but Chef Foods, Inc. However, it sustained the § 482 allocation of the net income of Chef Foods, Inc. to Your Host, Inc. and the net income of Your Host Bakery, Inc. to Sher-Del Foods, Inc. Having, in effect, disallowed their surtax exemption by the § 482 allocation, it did not

specifically rule on the § 269 issues as to them. The Second Circuit affirmed.

These findings are now the subject of a petition for a Writ of Certiorari filed by Your Host, Inc., *et al*, in Docket No. 73-1652.

Question Presented

Should this case be remanded to the Tax Court to decide if Chef Foods, Inc. and Your Host Bakery, Inc. should lose their surtax exemptions under § 269 of the Internal Revenue Code? (But only in the event that the Supreme Court should hold that the Commissioner was without authority to use § 482 to disallow the surtax exemptions indirectly).

Whether or not to Grant the Writ

The Respondents do not oppose the granting of this Writ coincidental to the granting of the Writ for which a petition was filed in Docket No. 73-1652. The Trial Court should have an opportunity to rule on the alternative § 269 issue if the Supreme Court should hold that it chose the wrong Section of the Code to disallow Chef's and Bakery's surtax exemption. Actually, the Trial Court made specific findings of fact showing that there were sound and substantial business reasons for the incorporation of both Chef Foods, Inc. and Your Host Bakery, Inc. (Petition, Appendix A, Pages 19-20). It found no facts that even suggest tax motives for their incorporation and Government Counsel has been unable to find or suggest any either.

Respectfully submitted,

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Dated: August 22, 1974.